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No. 08-305

In the Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT, PETITIONER

v.

T.A.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, permits an award of private-school tuition reimbursement when a child with a disability has been denied a free appropriate public education, but has not "previously received special education and related services under the authority of a public agency," 20 U.S.C. 1412(a)(10)(C)(ii).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
Private-school tuition reimbursement may be awarded to the parents of a child who has not previously received public special education when the child has been denied a free appropriate public education 11
A. The plain text of IDEA provides for reimbursement of private-school tuition when a school district fails to provide a free appropriate public education 12
1. Section 1415(i)(2)(C)(iii) authorizes awards reimbursing private-school tuition 12
2. Nothing in Section 1412(a)(10)(C) precludes an award of private-school tuition to the parents of a child who did not previously receive public special education 15
3. Petitioner's interpretation of Section 1412(a)(10)(C)(ii) disregards the canon against implied repeals 18
4. Petitioner's reading ignores key provisions of IDEA and is inconsistent with the overall structure of the Act 20
B. Petitioner's interpretation produces perverse consequences 23
C. The legislative history does not support petitioner's interpretation 28
D. The formal position of the agency charged with implementing IDEA is entitled to deference 29

Table of Contents—Continued: Page

E. The Spending Clause does not require a different result 32
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Baltimore City Bd. of Sch. Comm'rs v. *Taylorch*, 395 F. Supp. 2d 246 (D. Md. 2005) 25
Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 2
Board of Educ. v. *Tom F.*, 128 S. Ct. 1 (2007) 2
Branch v. *Smith*, 538 U.S. 254 (2003) 18, 19
Carter v. *Florence County Sch. Dist.*, 950 F.2d 156 (4th Cir. 1991) 14
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) . . 30, 32
Chisom v. *Roemer*, 501 U.S. 380 (1991) 28
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 20
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 32
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 20
Edwards-White v. *District of Columbia*, 785 F. Supp. 1022 (D.D.C. 1992) 15
Florence County Sch. Dist. Four v. *Carter*, 510 U.S. 7 (1993) . . . . . *passim*
Frank G. v. *Board of Educ.*, 459 F.3d 356 (2d Cir. 2006), cert. denied, 128 S. Ct. 436 (2007) 7
Gadsby v. *Grasmick*, 109 F.3d 940 (4th Cir. 1997) 15
Glus v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) 24

Cases—Continued: Page

Green v. *Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) 23
Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) 23
Hanover Bank v. *Commissioner*, 369 U.S. 672 (1962) . . . 16
Ivan P. v. *Westport Bd. of Educ.*, 865 F. Supp. 74 (D. Conn. 1994), aff'd, 101 F.3d 686 (2d Cir. 1996) 15
Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) 33
Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339 (2007) 31
Lorillard v. *Pons*, 434 U.S. 575 (1978) 18
Mallard v. *United States Dist. Ct.*, 490 U.S. 296 (1989) 20
Mary P. v. *Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996) 15
Messersmith v. *American Fid. Co.*, 133 N.E. 432 (N.Y. 1921) 24
National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 18
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 32
Posadas v. *National City Bank*, 296 U.S. 497 (1936) 18
Schaffer v. *Weast*, 546 U.S. 49 (2005) 23
School Comm. of the Town of Burlington v. *Department of Educ.*, 471 U.S. 359 (1985) . . . . . *passim*
Seattle Sch. Dist. No. 1 v. *B.S.*, 82 F.3d 1493 (9th Cir. 1996) 15

Cases—Continued: Page

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 31
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 28
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 32
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 19
Watt v. *Alaska*, 451 U.S. 259 (1981) 18
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 31
Winkelman v. *Parma City Sch. Dist.*, 550 U.S. 516 (2007) 3, 20, 22, 23, 27, 32

Constitution, statutes and rule:

U.S. Const. Art. I, § 1, Cl. 1 (Spending Clause) . . 10, 32, 33
Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 63 4
Individuals with Disabilities Act, 20 U.S.C., 1400 *et seq.* 1
20 U.S.C. 1400(d)(1)(A) 2, 7, 12, 23
20 U.S.C. 1401(9)(A) 2
20 U.S.C. 1401(9)(C) 26
20 U.S.C. 1401(29) 2, 22
20 U.S.C. 1406 . . . . . 1, 30
20 U.S.C. 1406(a) 31
20 U.S.C. 1412(a)(1)(A) . . . . . *passim*
20 U.S.C. 1412(a)(1)(B)(i) 21
20 U.S.C. 1412(a)(1)(B)(ii) 21
20 U.S.C. 1412(a)(3)(A) 2, 21

Statutes and rule—Continued: Page

20 U.S.C. 1412(a)(4) 2, 3, 22
20 U.S.C. 1412(a)(10)(A)(ii) 2, 21
20 U.S.C. 1412(a)(10)(C) ..... *passim*
20 U.S.C. 1412(a)(10)(C)(i) 4, 16, 18, 29
20 U.S.C. 1412(a)(10)(C)(ii) ..... *passim*
20 U.S.C. 1412(a)(10)(C)(iii) 4, 17, 28, 29
20 U.S.C. 1414 3
20 U.S.C. 1414(d) 2, 3, 22
20 U.S.C. 1415 3
20 U.S.C. 1415(b)(6)(A) 3
20 U.S.C. 1415(f) 6
20 U.S.C. 1415(f)(1)(A) 3
20 U.S.C. 1415(f)(3)(A) 3
20 U.S.C. 1415(i)(1) 3
20 U.S.C. 1415(i)(2)(A) 3
20 U.S.C. 1415(i)(2)(B)(iii) 30
20 U.S.C. 1415(i)(2)(C)(iii) ..... *passim*
20 U.S.C. 1415(m) 7
Or. Dep't of Educ. Admin. R. for Special Educ. 581-015-2325 (2007) <http://www.ode.state.or.us/policy/federal/idea/policyproced/section07ref.doc> ... 7

Miscellaneous:

143 Cong. Rec. 8013 (1997) 29
64 Fed. Reg. 12,602 (1999) 1, 30

Miscellaneous—Continued: Page

71 Fed. Reg. 46,599 (2006) 1, 30, 31
H.R. Rep. No. 95, 105th Cong., 1st Sess. (1997) 28, 29

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INTEREST OF THE UNITED STATES

This case presents the question whether the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. 1400 *et seq.*, permits an award of private-school tuition reimbursement when a child with a disability has been denied a free appropriate public education, but has not "previously received special education and related services under the authority of a public agency," 20 U.S.C. 1412(a)(10)(C)(ii). The Secretary of Education administers IDEA and has the authority to promulgate regulations to ensure compliance with the Act. 20 U.S.C. 1406. In commentary accompanying final regulations, the Secretary has taken the position that IDEA authorizes tuition reimbursement in such circumstances. 71 Fed. Reg. 46,599 (2006); 64 Fed. Reg. 12,602

(1999). The United States therefore has a substantial interest in the question presented. The United States participated as an *amicus curiae* in *Board of Education* v. *Tom F.*, 128 S. Ct. 1 (2007), a case raising the same question.

STATEMENT

1. IDEA provides federal grants to States to fund special education and related services for children with disabilities, and it conditions those grants on compliance with specific standards and procedures. The Act requires recipients of federal funding to ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. 1412(a)(1)(A); see 20 U.S.C. 1400(d)(1)(A). A "free appropriate public education" must include the special education and related services necessary to meet each child's unique needs. See 20 U.S.C. 1412(a)(4), 1414(d); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 200-203 (1982). Those services must be "provided at public expense," 20 U.S.C. 1401(9)(A), and "at no cost to parents," 20 U.S.C. 1401(29).

The Act "contemplates that [special] education will be provided where possible in regular public schools," but it "provides for placement in private schools at public expense where this is not possible." *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (*Burlington*). The Act also contains a "child find" provision that requires States to ensure that "[a]ll children with disabilities residing in the State, including * * * children with disabilities attending private schools," are "identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii).

IDEA allows the parents of a child with a disability to participate in decisions regarding the child's education, and it gives them important procedural rights. See 20 U.S.C. 1414, 1415; see also *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 524-526 (2007). In consultation with the parents, the local school district must develop an individualized education program (IEP) for the child. 20 U.S.C. 1412(a)(4), 1414(d). The IEP sets out the special education and related services that will provide the child a free appropriate public education. If the parents are not satisfied with a proposed IEP, they may file a complaint with the school district or the State "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. 1415(b)(6)(A), and they are entitled to "an impartial due process hearing" before an administrative hearing officer. 20 U.S.C. 1415(f)(1)(A); see 20 U.S.C. 1415(f)(3)(A) (prescribing qualifications for hearing officers).

Any party aggrieved by a final administrative decision may bring a civil action under IDEA in federal district court or an appropriate state court. 20 U.S.C. 1415(i)(1) and (2)(A). In such an action, the court has broad authority to fashion an equitable remedy by "grant[ing] such relief as the court determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). This Court has held that a court's authority under Section 1415(i)(2)(C)(iii) extends to awarding reimbursement of private-school tuition when a public school has not provided the required free appropriate public education. *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993); *Burlington*, 471 U.S. at 369-371.

In 1997, Congress amended IDEA and added a provision specifically addressing children in private schools. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 63; 20 U.S.C. 1412(a)(10)(C). Consistent with this Court's decisions in *Burlington* and *Carter*, Section 1412(a)(10)(C)(i) sets out the "general" rule that a school district is not required to pay the cost of private-school tuition if it "made a free appropriate public education available to the child and the parents elected to place the child in [a] private school." 20 U.S.C. 1412(a)(10)(C)(i); see *Burlington*, 471 U.S. at 369; *Carter*, 510 U.S. at 13-14. The Act also states that a court or hearing officer may require a school district to reimburse parents for the cost of private education for a child "who previously received special education and related services under the authority of a public agency," if "the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." 20 U.S.C. 1412(a)(10)(C)(ii). Such reimbursement "may be reduced or denied" if the parents have failed to cooperate in the IEP process, failed to provide timely notice of their intention to enroll the child in a private school, or otherwise behaved unreasonably. 20 U.S.C. 1412(a)(10)(C)(iii).

2. Petitioner is a school district in Washington County, Oregon. Respondent attended public schools in the district from kindergarten until the spring of his junior year in high school. Pet. App. 2a. He had substantial academic difficulties, but he passed from grade to grade, in part because of significant at-home help from his parents. *Ibid.*; see *id.* at 61a-62a.

In December 2000, when respondent was in ninth grade, his guidance counselor suspected that he might

have a learning disability. Pet. App. 2a. In January and February 2001, the school staff conducted two meetings at which respondent's parents were not present. *Id.* at 3a. Notes from those meetings indicate that the staff suspected respondent might have attention deficit hyperactivity disorder (ADHD). *Ibid.* No one from the school informed respondent's parents of their suspicions about ADHD. *Ibid.* Instead, respondent was evaluated by psychologists and educational specialists to determine if he had any learning disabilities (but not ADHD), and they concluded that he did not. *Ibid.*; *id.* at 3a n.1. A school official advised respondent's mother "to take a 'wait and see' approach," because "many boys had similar problems but started 'turning around' in their sophomore or junior years." *Id.* at 73a.

In the summer of 2001, respondent's mother emailed school officials to express her concern that respondent "apparently cannot process information or learn from the teaching methods used thus far" and to suggest that "there must be some method of teaching more appropriate for him." J.A. 104. Petitioner provided no assistance in response to that request. Pet. App. 74a. That fall, respondent began the tenth grade. After his first progress report showed that he was failing tests, his mother again contacted school officials, who told her that respondent could be referred for further evaluation, "but it would be difficult to find him eligible" for special education services. *Id.* at 77a-78a.

Respondent continued to fall behind in school. Pet. App. 81a. In 2002, he began using marijuana. *Id.* at 86a. Respondent's parents took him to a psychologist, and in March 2003 (during respondent's junior year), the psychologist diagnosed him with "ADHD, depression, math disorder, and cannabis abuse" and recommended that he

be admitted to a residential program. *Id.* at 4a. Respondent's parents then removed him from public school, and, after first sending him to a privately run three-week wilderness therapy program, they enrolled him in Mount Bachelor Academy, a private residential school that specializes in children with a variety of problems, including learning disabilities, substance abuse, and behavioral problems. *Ibid.*

3. Thereafter, respondent's parents requested a due process hearing under 20 U.S.C. 1415(f). Pet. App. 5a. The administrative hearing began in May 2003, but it was continued to allow school officials to evaluate respondent, which they did extensively in the summer of 2003, with his parents' full cooperation. *Ibid.* Although the evaluation team acknowledged respondent's learning difficulties and accepted the diagnosis of ADHD, a majority of the team concluded that his disabilities were insufficiently severe to entitle him to special education. *Ibid.* The administrative hearing resumed in September 2003, and both parties submitted evidence. *Ibid.*

In January 2004, the hearing officer issued a lengthy opinion finding that respondent had ADHD and that his condition was a qualifying disability under IDEA. Pet. App. 58a, 133a-141a. The hearing officer concluded that petitioner had failed to provide respondent with a free appropriate public education, that Mount Bachelor was an appropriate placement for respondent, and that respondent's parents were entitled to reimbursement for his tuition. *Id.* at 58a-60a, 150a-154a.

4. Petitioner brought this action in the United States District Court for the District of Oregon, seeking review

of the hearing officer's decision.[1] The district court reversed the hearing officer's award of tuition reimbursement. Pet. App. 25a-55a. The court adopted all of the hearing officer's findings of fact, *id.* at 44a, but it concluded that, under 20 U.S.C. 1412(a)(10)(C)(ii), "*only* children who had previously received special education services from [a public school] are even eligible for * * * tuition reimbursement," Pet. App. 48a-49a. The court also stated that, even if reimbursement were available in extraordinary circumstances for children who had not previously received special education, "[e]quitable considerations would not support tuition reimbursement in this case." *Id.* at 55a.

5. The court of appeals reversed and remanded. Pet App. 1a-24a.

a. The court of appeals adopted the analysis of the Second Circuit's decision in *Frank G.* v. *Board of Education*, 459 F.3d 356 (2006), cert. denied, 128 S. Ct. 436 (2007), which held that 20 U.S.C. 1412(a)(10)(C)(ii) does not categorically prohibit private-school tuition reimbursement for students who have not "previously received special education and related services." Pet. App. 13a. The court explained that interpreting Section 1412(a)(10)(C)(ii) to impose such a categorical prohibition would contravene the express statutory purpose of ensuring "that *all* children with disabilities have avail-

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[1] Respondent notes (Br. 10 n.1) that although the hearing officer awarded reimbursement to respondent's parents, petitioner named only respondent as a defendant in the district court. Under Oregon law, the parents' rights under IDEA were automatically transferred to respondent when he reached the age of majority in 2003. Or. Dep't of Educ. Admin. R. for Special Educ. 581-015-2325 (2007) <http://www.ode.state.or.us/policy/federal/idea/policyproced/section07ref.doc>; see 20 U.S.C. 1415(m) (permitting such a transfer).

able to them a free appropriate public education." *Id.* at 15a (quoting 20 U.S.C. 1400(d)(1)(A)). The court also observed that such an interpretation "would lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education." *Id.* at 15a-16a.

The court of appeals went on to hold that the district court's equitable analysis was based on an incorrect legal standard. Pet. App. 17a-18a. Specifically, the district court believed that reimbursement was available "only in *extreme cases* for parents who place their child in private school before receiving special education and related services in public school." *Id.* at 18a. The court of appeals remanded with instructions for the district court to "consider all relevant factors in determining whether to grant reimbursement." *Ibid.*

b. Judge Rymer dissented. Pet. App. 21a-24a. In her view, a free appropriate public education "was not at issue" when respondent's parents withdrew him from public school and "decided to put him in a private school for reasons of their own." *Id.* at 21a-22a.

SUMMARY OF ARGUMENT

When a child with a disability has been denied a free appropriate public education, IDEA authorizes an award of private-school tuition reimbursement regardless of whether the child previously received public special education.

IDEA guarantees a free appropriate public education for "all children with disabilities." 20 U.S.C.

1412(a)(1)(A). As this Court has twice unanimously held, IDEA's broad "appropriate" relief provision—which directs a court to "grant such relief as [it] determines is appropriate," 20 U.S.C. 1415(i)(2)(C)(iii)—authorizes a court to award private-school tuition reimbursement when the parents of a child with a disability unilaterally place their child in a private school pending a proceeding in which they prove that the child was denied a free appropriate public education. *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993)*; School Comm. of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985). A contrary conclusion, the Court has explained, would require parents to "go along with the [offered public education] to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement," and that Hobson's choice would deprive children with disabilities of the Act's central guarantee of a "free appropriate public education." *Id.* at 370.

Petitioner relies on 20 U.S.C. 1412(a)(10)(C)(ii), which was enacted as part of the 1997 amendments to IDEA, and which addresses a common situation in which private-school tuition reimbursement is sought—*i.e.*, for children with disabilities who previously received public special education. But Section 1412(a)(10)(C)(ii) neither expressly nor impliedly eliminates the pre-existing reimbursement remedy for parents of a child who has not previously received public special education. To the contrary, the language of that provision is permissive, not restrictive, and it places no limit on the authority of a court to grant appropriate relief in other circumstances.

Adopting petitioner's interpretation of Section 1412(a)(10)(C)(ii) would contradict the Act's express guarantee of a free appropriate public education to "*all*

children with disabilities" and would conflict with other provisions of the Act that confirm that a State's obligation to provide a free appropriate public education does not depend on a child's prior receipt of public special education. It also would flout the presumption against implied repeals, and it would produce absurd results, especially in cases like this one, where the only reason the child did not receive public special education is that the school district wrongly refused to provide it.

Because the statutory text is clear, there is no need for recourse to legislative history. In any event, the legislative history contains no indication that Section 1412(a)(10)(C) was intended to alter the substantive scope of the Act, or that it restricts the authority of a court to grant "appropriate" relief under Section 1415(i)(2)(C)(iii).

To the extent that the Court concludes that IDEA is ambiguous, it should defer to the Secretary of Education's interpretation. In 1999 and again in 2006, the Secretary stated that the authority to award reimbursement under the Act's "appropriate" relief provision is "independent of" the authority to award reimbursement under Section 1412(a)(10)(C)(ii), and that reimbursement is therefore available in the circumstances at issue here. Those interpretations were expressed in comments accompanying final regulations issued after notice-and-comment procedures, and they are entitled to deference.

Finally, petitioner's Spending Clause argument does not compel a different conclusion. The argument was not raised or passed on below, so it is not properly presented here. In any event, a determination that parents are eligible for reimbursement regardless of whether their child has previously received public special educa-

tion does not require special notice to States, because it does not expand States' substantive obligation to provide a free appropriate public education for "all children with disabilities." Moreover, the IDEA, this Court's precedents, and the Secretary's formal interpretation of the 1997 amendments have provided such notice.

ARGUMENT

PRIVATE-SCHOOL TUITION REIMBURSEMENT MAY BE AWARDED TO THE PARENTS OF A CHILD WHO HAS NOT PREVIOUSLY RECEIVED PUBLIC SPECIAL EDUCATION WHEN THE CHILD HAS BEEN DENIED A FREE APPROPRIATE PUBLIC EDUCATION

Under IDEA, "all children with disabilities"—regardless of whether they are enrolled in public or private school—enjoy the right to a free appropriate public education. 20 U.S.C. 1412(a)(1)(A). The remedial question presented here arises only after an administrative or judicial finding has been made that a child with a disability has been denied a free appropriate public education.

Petitioner contends that IDEA provides no authority to award reimbursement of private-school tuition to any child unless the child previously received public special education. That position is contradicted by the text, structure, and purposes of IDEA, this Court's precedent, and the formal interpretation of the agency charged with implementing the Act. Although a court has discretion to withhold such an award based on equitable considerations in any given case, IDEA contains nothing like the flat-out bar petitioner imports into the statute. To the contrary, it authorizes an award of private-school tuition to the parents of any child denied

a free appropriate public education, including a child who has not previously received public special education.

A. The Plain Text Of IDEA Provides For Reimbursement Of Private-School Tuition When A School District Fails To Provide A Free Appropriate Public Education

1. Section 1415(i)(2)(C)(iii) authorizes awards reimbursing private-school tuition

IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(d)(1)(A). To that end, IDEA specifies that a State must make a free appropriate public education available to "all children with disabilities residing in the State." 20 U.S.C. 1412(a)(1)(A). When a school district fails to comply with that mandate—either by failing to develop an adequate IEP for a disabled child or, as here, by failing to recognize in the first instance that the child has a disability—IDEA gives parents the right to challenge its decision in an administrative hearing or, if necessary, in court. The Act gives broad remedial authority to the court to "grant such relief as [it] determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii).

Although Congress has comprehensively amended IDEA on several occasions, it has not altered Section 1415(i)(2)(C)(iii) in any material way. And this Court has twice unanimously affirmed that Section 1415(i)(2)(C)(iii) authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471

U.S. 359, 369 (1985); accord *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993).

In *Burlington*, the father of a child with disabilities unilaterally enrolled the child in a private school after deciding that the school district's proposed placement was inappropriate in light of the child's poor performance under the IEP for the previous year. After a state administrative officer and a federal court agreed that the IEP was inappropriate, the father obtained reimbursement for private-school tuition. In a unanimous decision, this Court held that IDEA's "appropriate" relief provision authorized a court to award such reimbursement. *Burlington*, 471 U.S. at 370.

The Court explained that, without such a remedy, "the child's right to a *free* appropriate public education * * * would be less than complete," *Burlington*, 471 U.S. at 370, and it concluded that "Congress undoubtedly did not intend this result," *ibid.* The Court emphatically rejected the suggestion that IDEA posed a cruel choice to parents of either "go[ing] along with the IEP to the detriment of their child if it turns out to be inappropriate or pay[ing] for what they consider to be the appropriate placement." *Ibid.* At the same time, however, the Court stressed that parents who unilaterally place their children in private school during a pending challenge to a proposed IEP "do so at their own financial risk." *Id.* at 373-374. After all, to obtain reimbursement, parents must prove not only that the services that the child received in the private school were appropriate, but also that the public school's IEP was legally insufficient.

Eight years later, in *Carter*, this Court unanimously reaffirmed *Burlington* and held that "a court may order reimbursement for parents who unilaterally withdraw

their child from a public school that provides an inappropriate education under IDEA." *Carter*, 510 U.S. at 9. There, the parents of a child with a disability removed her from a public school and enrolled her in private school because they were dissatisfied with the school district's IEP, which had been implemented for the last month of the prior year. See *Carter* v. *Florence County Sch. Dist.*, 950 F.2d 156, 159 (4th Cir. 1991). The Court held that tuition reimbursement was authorized even though the private school did not meet state education standards, explaining that construing IDEA "to bar reimbursement in the circumstances of this case would defeat th[e] statutory purpose" of "ensur[ing] that children with disabilities receive an education that is both appropriate and free." *Carter*, 510 U.S. at 13-14.

The Court dismissed the school district's concerns about the financial burden of allowing reimbursement. *Carter*, 510 U.S. at 15-16. It pointed out that public schools can avoid the financial burden of reimbursement by simply "giv[ing] the child a free appropriate public education in a public setting, or plac[ing] the child in an appropriate private setting of the State's choice." *Id.* at 15. "This is IDEA's mandate," this Court explained, "and school officials who conform to it need not worry about reimbursement claims." *Ibid.*

Burlington and *Carter* underscore that Section 1415(i)(2)(C)(iii)'s broad remedial provision, including its reimbursement component, is integral to ensuring that eligible children receive an education that is both free and appropriate. Although *Burlington* and *Carter* both involved children with disabilities who had received some public special education before their parents became dissatisifed and opted for private school, neither decision suggests that a child's receipt of such services

is relevant to the reimbursement determination, much less that it constitutes a threshold condition for reimbursement. Indeed, following *Burlington*, lower courts routinely awarded reimbursement to parents of children who had not previously received public special education. See, *e.g.*, *Gadsby* v. *Grasmick*, 109 F.3d 940 (4th Cir. 1997); *Seattle Sch. Dist. No. 1* v. *B.S.*, 82 F.3d 1493 (9th Cir. 1996); *Mary P.* v. *Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996); *Ivan P.* v. *Westport Bd. of Educ.*, 865 F. Supp. 74 (D. Conn. 1994), aff'd, 101 F.3d 686 (2d Cir. 1996) (Table); *Edwards-White* v. *District of Columbia*, 785 F. Supp. 1022 (D.D.C. 1992).

2. Nothing in Section 1412(a)(10)(C) precludes an award of private-school tuition to the parents of a child who did not previously receive public special education

Congress amended IDEA in 1997. Although Congress left the Act's "appropriate" relief provision unchanged, it added a new provision, Section 1412(a)(10)(C), addressing tuition reimbursement for parents of some children with disabilities who are enrolled in private schools. According to petitioner (Br. 26), Section 1412(a)(10)(C)(ii) "unambiguously" imposes a "categorical bar" to reimbursement where a child has not previously received special education from a public agency. Petitioner is incorrect.

a. Petitioner's interpretation is contradicted by the text of Section 1412(a)(10)(C)(ii) itself. There is nothing restrictive about Section 1412(a)(10)(C)(ii) at all. To the contrary, it is phrased permissively. The provision states that if the "parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll

the child" in private school without the consent of the public agency, then "a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if * * * the agency had not made a free appropriate public education available to the child in a timely manner." 20 U.S.C. 1412(a)(10)(C)(ii). The provision does not say that a court may grant such relief only in those circumstances, nor does it say that a court may not grant such relief in other circumstances. Petitioner's interpretation requires the Court to insert limiting language and a limiting concept into Section 1412(a)(10)(C)(ii) that Congress did not employ. See *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687 (1962) ("[W]e are not at liberty * * * to add to or alter the words employed to effect a purpose which does not appear on the face of the statute.").

b. Petitioner's reading is also inconsistent with the surrounding provisions in Section 1412(a)(10)(C). Significantly, the Subsection immediately preceding Section 1412(a)(10)(C)(ii)—titled "In general"—reaffirms (as noted in *Burlington* and *Carter*) that a public agency is not required to pay for the tuition "of a child with a disability at a private school * * * if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school." 20 U.S.C. 1412(a)(10)(C)(i); see *Burlington*, 471 U.S. at 369; *Carter*, 510 U.S. at 13-14. That Subsection, unlike the one on which petitioner relies, expressly limits the circumstances in which an agency must reimburse private-school tuition. It underscores that parents who opt for private school bear the risk that an adjudicator might determine that the proposed IEP that they rejected actually satisfied IDEA. And it creates a safe harbor for school districts by guaranteeing that, so

long as they make available a free appropriate public education, they will not incur any obligation to reimburse private-school tuition.

Subsections (C)(ii) and (C)(iii) elaborate the "general" rule of Subsection (C)(i) by addressing the common situation in which a school district provides some special education and related services, but the parents believe that those services are inadequate. In that situation, Subsection (C)(ii) identifies conditions under which reimbursement "may" be required—*i.e.*, if the school district "had not made a free appropriate public education available." Conversely, Subsection (C)(iii) identifies conditions under which reimbursement "may be reduced or denied"—*i.e.*, if the parents fail to cooperate in the IEP process, fail to provide timely notice of their intention to enroll the child in a private school, or otherwise behave unreasonably. Thus, when a child is receiving special education, Subsections (C)(ii) and (C)(iii) work together to encourage both the school district and the parents to cooperate in developing and implementing an IEP that will provide a free appropriate public education.

Petitioner's interpretation would wrench Subsection (C)(ii) from its context. It would create an additional, and potentially much larger, safe harbor for school districts, allowing them to avoid any obligation to reimburse private-school tuition simply by refusing to provide special education and related services themselves —no matter how much a child needs those services and is entitled to them under IDEA. Particularly in light of *Burlington*, *Carter*, and the broad statutory authorization for equitable relief, what petitioner's argument requires to succeed is not the language of Subsection (C)(ii), which authorizes reimbursement of tuition in a

different context, but language that expressly denies the availability of reimbursement in the circumstances of this case. The absence of any such restrictive language in Subsection (C)(ii) is underscored by the use of language expressly precluding tuition reimbursement in circumstances (described in Subsection (C)(i)) that all parties agree are not present here.

3. Petitioner's interpretation of Section 1412(a)(10)(C)(ii) disregards the canon against implied repeals

Well before the 1997 amendments to IDEA, *Burlington* and *Carter* made clear that Section 1415(i)(2)(C)(iii) grants courts the authority to order reimbursement to parents in respondent's circumstances. Petitioner's argument depends on the notion that Section 1412(a)(10)(C)(ii) impliedly repealed part of the authority conferred by Section 1415(i)(2)(C)(iii). But Congress is presumed to have been aware of this Court's interpretation of Section 1415(i)(2)(C)(iii) and to have endorsed it by reauthorizing and amending the statute while leaving the relevant language unchanged. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

This Court has repeatedly held that "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (brackets in original) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)). As the Court has emphasized, "[a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch* v. *Smith*, 538

U.S. 254, 273 (2003) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). Neither of those conditions is close to satisfied here.

Giving effect to this Court's interpretation of IDEA's "appropriate" relief provision creates no "irreconcilable conflict" with Section 1412(a)(10)(C)(ii). As explained above, Section 1412(a)(10)(C)(ii) is phrased in permissive terms and addresses the standards that govern one specific situation in which reimbursement claims commonly arise: when parents are dissatisfied with the special education their child is receiving in a public school and place the child in a private school in pursuit of a more appropriate education. Recognizing that courts retain their authority under Section 1415(i)(2)(C)(iii) to grant reimbursement to parents in other situations in no way conflicts with Section 1412(a)(10)(C)(ii). Likewise, because Section 1412(a)(10)(C)(ii) does not "cover[] the whole subject" of tuition reimbursement addressed by the "appropriate" relief provision, there is no basis for concluding that the newer section was intended, much less "clearly intended," to operate as a "substitute" for the relief provision. *Branch*, 538 U.S. at 273.

Petitioner suggests (Br. 31-32) that Section 1412(a)(10)(C)(ii) displaces the general remedial authority conferred by Section 1415(i)(2)(C)(iii) because it is a more specific provision. But the canon that the specific controls the general operates "as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996). Allowing respondent to invoke IDEA's "appropriate" relief provision does not undermine any "limitation" created by Section 1412(a)(10)(C)(ii), because that provision imposes no limitations at all.

Nor is Section 1412(a)(10)(C)(ii) made superfluous if it is not an implied repeal. As this Court has explained, "[s]tatutory provisions may simply codify existing rights or powers." *Mallard* v. *United States Dist. Ct.*, 490 U.S. 296, 307 (1989). Here, Section 1412(a)(10)(C)(ii) codifies the right to pursue reimbursement in one specific and potentially troublesome situation, presented in both *Burlington* and *Carter*. In any event, to the extent that there is some overlap between the relief available under Section 1412(a)(10)(C)(ii) and that under Section 1415(i)(2)(C)(iii), such a result is neither problematic nor unusual. As this Court has explained, "[r]edundancies across statutes are not unusual events in drafting," and courts should give effect to all provisions absent a "positive repugnancy." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (internal quotation marks omitted). No such repugnancy exists here.

4. Petitioner's reading ignores key provisions of IDEA and is inconsistent with the overall structure of the Act

Petitioner's interpretation is not only unsupported by Section 1412(a)(10)(C) but also inconsistent with other provisions of IDEA. As this Court has explained, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989); see *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007) ("[A] proper interpretation of [IDEA] requires a consideration of the entire statutory scheme."). Petitioner's position conflicts with several parts of the Act.

First, and most fundamentally, petitioner's reading contravenes IDEA's central guarantee of providing a free appropriate education to "*all* children with disabilities." 20 U.S.C. 1412(a)(1)(A) (emphasis added). Congress set out only two "[l]imitation[s]" on that obligation, one relating to children "aged 3 through 5 and 18 through 21" where the obligation would conflict with State law or practice, 20 U.S.C. 1412(a)(1)(B)(i), and the other relating to incarcerated persons, 20 U.S.C. 1412(a)(1)(B)(ii). Neither limitation is applicable here, and there is no basis for creating an additional exception.

As this Court has recognized, denying tuition reimbursement to the parents of a child who is unilaterally enrolled in private school because of the inadequacy of an IEP would make "the child's right to a *free* appropriate public education * * * less than complete." *Burlington*, 471 U.S. at 370; see *id.* at 372 (forcing parents to choose between subjecting a child with a disability to an inappropriate placement or obtaining an appropriate placement at the expense of "sacrificing any claim for reimbursement" would deny parents the Act's right to "both an appropriate education and a free one"). That is true *a fortiori* where the IEP is not inadequate but nonexistent—where, that is, the parents have enrolled the child in a private school because the school district has failed to recognize that the child is disabled and therefore has not proposed any IEP at all.[2]

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[2] Petitioner's reading is also at odds with IDEA's child-find requirement. The Act does not treat previously unserved students as second-class citizens. To the contrary, it obligates States to identify, locate, and evaluate "[a]ll children with disabilities residing in the State, including children with disabilities * * * attending private schools." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii). The purpose

This Court recently observed that it found "nothing in [IDEA] to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." *Winkelman*, 550 U.S. at 533 (quoting 20 U.S.C. 1401(29)). The Court therefore refused to adopt a reading of the statute that would "leave[] some parents without a remedy." *Id.* at 532. Petitioner's reading of Section 1412(a)(10)(C)(ii) would do just that, because it would deprive one class of parents—those whose children have not previously received public special education and related services—of a reimbursement remedy even when a court finds that a school district wrongfully withheld those very services and so denied their children an appropriate public education.

Second, and more generally, petitioner's reading conflicts with the elaborate substantive and procedural requirements of IDEA that are aimed at ensuring that all children with disabilities actually receive a free appropriate education. Under the statute, school districts must identify each disabled child and, in consultation with parents, develop an IEP setting out the special education and related services that will meet that child's unique educational needs. 20 U.S.C. 1412(a)(4), 1414(d); see *Winkelman*, 550 U.S. at 523-526 (detailing parents'

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of finding such previously unserved children is to ensure that the State makes available to them a free appropriate education. Petitioner's interpretation would have the States seek such students out, but then deny them a free appropriate education, through the mechanism of tuition reimbursement, unless their parents were first willing to subject them to demonstrably inadequate public special education. In *Burlington*, this Court observed that imposing such a choice on parents would contravene the Act's basic guarantees. 471 U.S. at 370.

procedural rights); see also *Schaffer* v. *Weast*, 546 U.S. 49, 51-53 (2005). Under petitioner's theory, a court might find that a school district had deprived a child of appropriate services and that a private school would provide those services, and yet lack the power to order relief ensuring a "free and appropriate" education. This result contravenes the entire structure of IDEA.

B. Petitioner's Interpretation Produces Perverse Consequences

As explained above, adopting petitioner's reading of Section 1412(a)(10)(C)(ii) would frustrate IDEA's express purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. 1400(d)(1)(A). Indeed, when considered in light of IDEA's broad objectives, petitioner's reading would produce perverse results, and it should be rejected for that reason. See, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509-511 (1989); *id.* at 527 (Scalia, J., concurring in the judgment); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); see also *Winkelman*, 550 U.S. at 531 (interpreting IDEA to avoid "incongruous results").

1. Petitioner's reading means that reimbursement can never be available to parents if a school district wrongly refuses to identify their child as having a covered disability. As the court of appeals observed, "if the school district declined to recognize a student as disabled—as occurred in this case—the student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement." Pet. App. 16a. That result would be astonishing, especially given that relief under IDEA is governed by "equitable considerations," *Burlington*, 471 U.S. at 374, and

a familiar principle of equity holds that a party may not profit from its own wrong, see *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-233 (1959); *Messersmith* v. *American Fid. Co.*, 133 N.E. 432, 433 (N.Y. 1921) (Cardozo, J.). No one disputes that respondent's parents might be entitled to reimbursement if petitioner had recognized respondent's disability and provided him with a modicum of special education. Petitioner's wrongful refusal even to acknowledge a child's disability cannot be thought to eliminate this avenue of relief. Petitioner violated the Act by failing to give respondent a free appropriate public education; that it also violated the Act by failing to recognize respondent's disability should not allow it to escape the obligation to reimburse private-school tuition that it otherwise would bear.

Petitioner contends (Br. 38-39) that it is unlikely that "the circumstances hypothesized by" the court of appeals "would come to pass." But the circumstances described by the court of appeals are not hypothetical; they are essentially the facts of this case. Respondent left public school and enrolled at Mount Bachelor in March 2003. Pet. App. 5a. His parents sought an administrative hearing in April 2003, and the hearing officer did not issue a decision until January 2004. *Id.* at 5a-6a. The district court did not issue its decision until May 2005, almost a year after respondent had completed high school. *Id.* at 55a.

In petitioner's view, respondent should have languished in public school—where he was not receiving an appropriate education—until litigation over his eligibility for special education was completed. This Court rejected just such a theory in *Burlington*. There, the Court acknowledged that "[i]f the administrative and judicial review under the Act could be completed in a

matter of weeks," then prospective injunctive relief might be sufficient. *Burlington*, 471 U.S. at 370. But it went on to observe, in language fully applicable here, that "[a]s this case so vividly demonstrates, * * * the review process is ponderous." *Ibid.* Even expedited administrative and judicial proceedings will take weeks or months during what may be a critical period in the development of a disabled child. While those proceedings run their course, petitioner would put parents to a choice of leaving the child in an inappropriate placement or paying for an appropriate placement in a private school. Under that regime, the child's right to a free and appropriate education "would be less than complete." *Ibid.*

2. In addition, under petitioner's reading, if a school district does recognize a child as disabled but proposes a patently inadequate IEP, the parents must nevertheless subject their child to the inappropriate program just to qualify for reimbursement. One district court has suggested that the problem of having to place a disabled child in an inappropriate program could be alleviated by placing the child in that program for "as short a period as one day." *Baltimore City Bd. of Sch. Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md. 2005). But that holding only highlights the potential absurdities that flow from petitioner's position.

Appropriate education during a child's formative years is critical to a child's development. Moving a child from one school to another can be highly disruptive to a child, both educationally and psychologically. That is true for any youth; it may be especially true for a child with a disability. It would be absurd to conclude that Congress created a regime whereby parents would have to compound the educational difficulties their children

have by subjecting them to inappropriate schools merely to qualify for tuition reimbursement.

3. Petitioner's interpretation of Section 1412(a)(10)(C)(ii) would generate other perverse results. Under IDEA, a school district's responsibility to provide educational services generally begins at age three. 20 U.S.C. 1412(a)(1)(A); see 20 U.S.C. 1401(9)(C) (defining "free appropriate public education" to include "an appropriate *preschool*, elementary school, or secondary school education") (emphasis added). But Section 1412(a)(10)(C)(ii) addresses reimbursement only for children enrolled in "a private elementary school or secondary school." Thus, if petitioner were correct that Section 1412(a)(10)(C)(ii) identifies the only circumstances in which a court may grant tuition reimbursement, IDEA would not permit reimbursement to the parents of any child over the age of three who attends a preschool program. Under petitioner's restrictive reading, that would be true even if the preschooler had previously received inadequate special education under public authority.

In addition, petitioner's theory would deny reimbursement for private tutoring and similar expenses incurred by the parents of a child who remains in public school. For example, if a child with a disability were receiving special education and related services from a public school, but the parents felt that additional services were needed, the parents might challenge the level of services the public school provided—say, one hour of speech therapy per week rather than four. During the pendency of the administrative or judicial proceedings, they might obtain the additional three hours from a private source. Section 1412(a)(10)(C)(ii) addresses only the case in which a child is "enroll[ed] * * * in a pri-

vate elementary school or secondary school." If it is the exclusive avenue for reimbursement of private educational expenses, then even if a court later determined that the additional three hours should have been provided, the parents would be statutorily ineligible for reimbursement.

In each of these circumstances, as in this case, petitioner's interpretation would deprive a child of a free and appropriate education when all the fault lay with the public school. That interpretation would permit schools to impose the burden of their failures on children and their parents, a result that this Court soundly rejected in *Burlington* and *Carter*.

4. Petitioners argue (Br. 40) that denying reimbursement in these circumstances is necessary to avoid creating an "incentive for parents to preemptively enroll a child in private school, without engaging the district regarding whether and, if so, what type of special education would be available." But parents who unilaterally place their children in private school "do so at their own financial risk." *Carter*, 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 374). That provides a substantial practical check on abusive or manipulative conduct. As Justice Scalia recently explained, "[a]ctions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the [public education] was inadequate." *Winkelman*, 550 U.S. at 543 (Scalia, J., concurring in the judgment in part and dissenting in part). Moreover, even after a violation of IDEA is established, courts have broad equitable discretion in determining what relief is "appropriate," and they may take into account the actions of parents—including any precipitous or preemptive action on

their part—in determining "the appropriate and reasonable level of reimbursement that should be required." *Carter*, 510 U.S. at 15-16; see *Burlington*, 471 U.S. at 374; *id.* at 366-367.

C. The Legislative History Does Not Support Petitioner's Interpretation

Because the language of Section 1415(i)(2)(C)(iii) is clear, there is no need for recourse to the legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989). In any event, petitioner's arguments based on the legislative history (Br. 25-27) are unpersuasive.

Significantly, despite numerous hearings and debates on the 1997 amendments, there is no evidence in the legislative record that Congress intended to cut back on the Act's "appropriate" relief provision or that it disagreed with the rationale of *Burlington* or *Carter*. That "dog that did not bark" bolsters the conclusion that Congress did not intend Section 1412(a)(10)(C) to remove an important part of the district courts' remedial authority. *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991).

To the contrary, the House Report supports the conclusion that Section 1412(a)(10)(C)(ii) and (iii) were intended not to restrict a court's authority to order reimbursement, but simply to set out appropriate criteria to be applied in one specific situation. In introducing the amendments' treatment of the reimbursement remedy, the report discusses the criteria to be used when deciding whether the remedy is appropriate, and it makes no mention of whether the child had previously received services from the public agency. H.R. Rep. No. 95, 105th Cong., 1st Sess. 91-92 (1997) (*1997 House Rep.*).

Petitioner relies on a later passage in which the report observes that "[p]reviously, the child must have had received special education and related services under the authority of a public agency." Br. 26 (quoting *1997 House Rep.* 93). The meaning of that cryptic and ungrammatical sentence is not obvious, but it is most naturally read as a description of prior law (albeit an inaccurate one), not of the intended future effect of the amendments. In any event, the sentence does not state that Section 1412(a)(10)(C)(ii) is the only provision under which the remedy of reimbursement might be obtained, and it gives no indication of an intent to eliminate the remedies this Court had already recognized as available under Section 1415(i)(2)(C)(iii).

Petitioner also relies on a floor statement to the effect that the 1997 amendments would "make[] it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense." Br. 25 (quoting 143 Cong. Rec. 8013 (1997) (statement of Rep. Castle)). There is no dispute that the safe harbor of Section 1412(a)(10)(C)(i) does just that. So too does Section 1412(a)(10)(C)(iii), which permits courts to reduce or deny reimbursement in cases where parents fail to cooperate with the IEP process. But nothing in the statement suggests that Section 1412(a)(10)(C) imposes a categorical bar to tuition reimbursement when children have not previously received public special education.

D. The Formal Position Of The Agency Charged With Implementing IDEA Is Entitled To Deference

For the reasons discussed above, IDEA authorizes reimbursement of private-school tuition when a school district has failed to provide a free appropriate public education, whether or not the child previously received

special education under the authority of a public agency. To the extent that the Court has any doubt as to that conclusion, however, it should defer to the considered views of the Secretary of Education, the official charged with implementing the Act. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); see 20 U.S.C. 1406.

In 1999, the Secretary adopted regulations implementing the 1997 amendments to IDEA. In commentary accompanying the final regulations, the Secretary directly addressed the question presented here, stating:

> [H]earing officers and courts retain their authority, recognized in *Burlington* and [*Carter*] to award "appropriate" relief if a public agency has failed to provide [a free appropriate public education], including reimbursement and compensatory services, under [20 U.S.C. 1415(i)(2)(B)(iii)] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under [20 U.S.C. 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

64 Fed. Reg. at 12,602.

Similarly, in a 2006 rulemaking, the Secretary rejected a proposal to adopt regulations foreclosing reimbursement in cases where a child had not first received public special education. 71 Fed. Reg. at 46,599. Instead, in commentary accompanying the final rule, the Secretary explained that she did "not believe it [was] appropriate to include in these regulations a provision relieving a public agency of its obligation to provide tuition reimbursement for a unilateral placement in a private school if the child did not first receive special educa-

tion" from that agency. *Ibid.* And she reiterated that the authority to award tuition reimbursement under Section 1415(i)(2)(C)(iii) is "independent of the court's or hearing officer's authority under [20 U.S.C. 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency." 71 Fed. Reg. at 46,599.

The Secretary's interpretation is entitled to deference under *Chevron*. This Court has long recognized that official agency interpretations of a statute formally adopted through notice-and-comment rulemaking, formal adjudication, or some other "relatively formal administrative procedure tending to foster * * * fairness and deliberation" are entitled to *Chevron* deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001); see *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (extending deference to agency's interpretation of its regulations contained in an "Advisory Memorandum" because the interpretation "reflects [the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to final regulations).

In this case, the Secretary's commentary was the product of a formal process and was issued under the statutory authority to "issue regulations * * * that * * * are necessary to ensure that there is compliance with the specific requirements of this chapter." 20 U.S.C. 1406(a). Petitioner suggests (Br. 34) that the Secretary's interpretation "exceeded the scope of * * * delegated authority under the IDEA," since "nothing in IDEA *specifically* requires" reimbursement in this context. Even if that were correct, it would hardly be a ba-

sis for refusing to defer, since the point of *Chevron* is to give deference to an agency's interpretation when Congress has not "directly spoken to the precise question at issue." 467 U.S. at 842. Because the Secretary's carefully considered interpretation is, at a minimum, reasonable, the Court should defer to it.

E. The Spending Clause Does Not Require A Different Result

Finally, petitioner relies on the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1), arguing that reimbursement cannot be required in this case because IDEA rests on Congress's spending power, which requires that conditions on a State's acceptance of federal funds be set out "unambiguously." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst*). That argument was not raised or passed on below, and this Court should decline to consider it. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In any event, the argument lacks merit.

This Court has held that the clear-statement requirement of *Pennhurst* applies only when a funding condition would "impose [a] substantive condition or obligation on States they would not otherwise be required by law to observe." *Winkelman*, 550 U.S. at 534. Thus, in *Winkelman*, the Court rejected the argument that Spending Clause principles required Congress to provide clear notice that IDEA grants independent rights to parents, since allowing parents to sue to enforce the IDEA did not "result in a change to the States' statutory obligations." *Ibid.* The same is true here, because IDEA unambiguously imposes on States the substan-

tive obligation to provide a free appropriate public education to "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). Reimbursement of tuition is not an additional obligation; it represents "expenses that [the State] should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 370-371; see *Carter*, 510 U.S. at 15 (explaining that school districts that "conform to [IDEA] need not worry about reimbursement claims").

Moreover, the text of IDEA and this Court's precedent put States on notice that reimbursement of private-school tuition is available when a school district denies a child with a disability an appropriate public education, regardless of whether the child previously received public special education. In addition, the formal interpretation of the Secretary of Education, published in the *Federal Register*, provided even clearer notice. See pp. 30-31, *supra*. Petitioner challenges the validity of that interpretation (Br. 34-36), but it cannot claim to have lacked notice of it. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (rejecting a Spending Clause challenge, in part because "[t]he regulations implementing" the statute provided notice to States). What petitioner seeks here is not clear notice, but a windfall in the form of an exception to a long-recognized right to reimbursement under IDEA. Nothing in this Court's Spending Clause jurisprudence supports that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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